IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.338 OF 2007

IN

SUIT NO.116 OF 1983

Indian Container Terminal Pvt.Ltd. ...Appellant.

vs.

Anant Janardhan Patil & others. ...Respondents.

Mr.C.S.Balsara i/b. M/s.Desai and Diwanji, for Appellant.

Mr.H.S.S.Murthy, for Respondents.

CORAM: D.K.DESHMUKH &

J.H.BHATIA, JJ.

DATED: 18th July,2007.

P.C.:-

1. By this appeal, the appellant plaintiff challenges the order dated 27.2.2006 passed by the learned Single Judge dismissing the suit. The suit of the plaintiff was for decree of specific performance. There are three defendants in the suit viz. (i) Anant Janardhan Patil, (ii) Ravindra Anant Patil and (iii) Chandrakant Anant Patil. The defendant no.1 Anant J. Patil is father. The defendant nos.2 and 3 are the sons. The defendant no.1 expired on 26.7.1992. The Court by order dated 27.2.2006 noted that the defendant no.1 has expired long back, his heirs have not been brought on record and therefore, suit against defendant no.1 abates. As the defendants are joint owners of the land in relation to which the decree of specific performance was sought and as now the defendant

no.1 is not a party to the suit nor his legal representatives are brought on record, the Court dismissed the suit. The learned Counsel appearing for plaintiff pointed out that though it is true that all the legal representatives of the deceased defendant no.1 were not brought on record, the defendant nos. 2 and 3 are the sons of the deceased Anant and therefore, they are also the legal representatives of the deceased defendant no.1. Relying on the judgment of the Supreme Court in the case “Mahabir Prasad V. Jage Ram and others, AIR 1971 Supreme Court 742”, it is submitted that as the defendant nos.2 and 3 are also the legal representatives of the deceased defendant no.1, the suit could not have abated so far as the legal representatives of defendant no.1 are concerned.

2. We have heard the learned Counsel appearing for defendant no.2. In view of the judgment of the Supreme Court in “Mahabir Prasad”

case, as the defendant nos. 2 and 3 were on record of the suit, obviously the learned Single Judge could not have held that the suit against the defendant no.1 abates, as some of the legal representatives of deceased defendant no.1 were on record. The appeal therefore, will have to be allowed. In our opinion, the following order would meet the ends of justice:-

(i) The order impugned in the appeal dated 27.2.2006 passed in suit no.116 of 1983 is set aside. The plaintiff is granted leave to amend the plaint in terms of draft amendment handed in which is marked “X” for identification. Amendment to the plaint to be carried out within four weeks from today. The plaintiff shall serve the amended copy of the plaint on all the defendants.

(ii) It is submitted before us on behalf of the defendant no.2 that though the plaintiff is

not yet the owner of the property, and even according to the plaintiff, he is occupying the premises but he is not paying anything to any of the defendants, the plaintiff should be directed to make payment of occupation charges to the defendants. In our opinion, this request cannot be considered in this appeal. However, the defendants shall be at liberty to take out notice of motion in the suit seeking appropriate relief. In case such a notice of motion is taken out, it shall be considered on its own merit in accordance with law. The appeal is disposed of.

The appellant is directed to pay cost of this appeal to the respondent no.2. The cost is quantified at Rs.5,000/-.

(D.K.DESHMUKH, J.)

(J.H.BHATIA,J.)